United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2122

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-2122

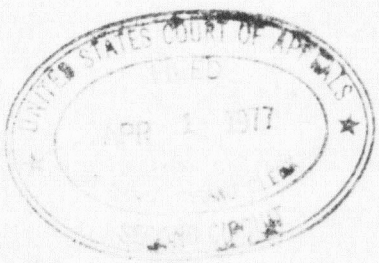
PAUL MOYNAHAN,
Petitioner-Appellee,

—vs.—

JOHN MANSON, Commissioner of Corrections for Connecticut,
Respondent-Appellant.

APPEAL FROM ORDER OF DISTRICT COURT FOR DISTRICT OF CONNECTICUT GRANTING A WRIT OF HABEAS CORPUS

BRIEF OF PAUL MOYNAHAN



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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-2122

PAUL MOYNAHAN,
Petitioner-Appellee,

—VS.—

JOHN MANSON, Commissioner of Corrections for Connecticut,
Respondent-Appellant.

BRIEF OF PAUL MOYNAHAN

Statement of Issues

1. Did the district court err in finding constitutional error in the refusal of the trial court to allow cross-examination or collateral evidence to establish that a State's witness was involved in the "stolen goods ring" referred to by the prosecution and thus indicate the bias, interest or motive of that witness to testify in a manner favorable to the State?

2. Did the district court err in finding constitutional error in the failure of the prosecution to turn over prior statements of prosecution witnesses which contained statements contradictory to the in court testimony of such witnesses?

3. Did the district court err in finding constitutional error in the actions of the prosecution in obtaining invocations of the Fifth Amendment from its own witness?

Statement of the Case

A. Nature And Course of Proceedings:

Paul Moynahan, the petitioner-appellee, was tried and convicted before a Superior Court jury in Waterbury, Connecticut of the crime of receiving stolen goods in violation of Sections 53-63 and 53-65 of the Connecticut General Statutes. (Record (R), Ex. 2, pp. 17-8). He was sentenced to a year and a day to two years imprisonment and fined $500. (R, Ex. 2, p. 18)

The habeas corpus petition filed with this court alleged that Paul Moynahan was in fact innocent of the charge and had been convicted in a proceeding which violated his due process rights in several respects. Of those claims only the following issues are now before this Court:

(a) the withholding of evidence by the State;

(b) undue restrictions upon the cross-examination of a key State's witness; and

(c) the invocation of the Fifth Amendment in the jury's presence by a State's witness in answer to questions by the prosecution.

This case was decided by the district court without hearing based upon the various exhibits in the Record, upon certain documents which had been sealed by the original trial court in 1970 and had never been examined by that judge or, any subsequent appeals' judge or post-trial judge (R, Ex. 24 for ID); [Appendix (A), pp. 6-12, 20-64, 88-96, 100-107, 242-245] and upon several briefs of law.

In the briefs of law filed by the petitioner certain additional evidence was offered either as proof or as an offer of what would be proven if the court decided that the State Court Record was inadequate to determine the claims presented.

The principal areas where resort to facts outside the State Court Record were made were, (1) The claim of the State's attorney before the original trial that the State had a "clean" witness who would put the stolen set in Moynahan's house; (2) The issue of waiver of the right to cross-examine Edward Miller, as to which issue reference was made to an in chambers conference at trial wherein the judge stated that any questions to the jury seeking to develop Edward Miller's criminal involvement with Charles Vernale would result in an immediate mistrial (R, Ex. E, pp. 29-30); (3) The posttrial evidence obtained affirmatively from John Bishop and Charles Vernale and inferentially through the repeated invocation of the Fifth Amendment by Edward Miller which tended to establish that the limitation on the cross-examination of Edward Miller was material since Miller was not in fact "clean" and had in reality been a conscious participant in the receipt and resale of television sets stolen by John Bishop and delivered to Charles Vernale.[1]

The petitioner sets forth these matters mainly because they might bear upon the relief granted by this court if

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[1] In the proceedings before Judge Blumenfeld, Paul Moynahan offered the brief and claims of fact presented at the hearing for a new trial (R, Ex. E) in support of the evidential claims made in this proceeding and represented that such evidence existed in the transcript of those proceedings. The petitioner further indicated that if the district court had any reservation about accepting the evidence in that form then such claims could be treated as an offer of proof to be supported in a later evidential hearing.

a reversal were ordered since they relate to actually or potentially significant issues, i.e.

(1) Whether the attempts to cross-examine Edward Miller were in fact actually abandoned.

(2) The materiality of the nondisclosure of certain prior statements of Edward Miller.

(3) The knowledge of the prosecution as to Edward Miller's actual involvement.

The district court concluded that resort to such outside facts was unnecessary since the issues could be decided in the petitioner's favor on the Record presented without further evidence. The court therefore ordered the charges against the petitioner dismissed unless he was retried within 60 days. The State has appealed this ruling.

B. Statement Of The Facts:

The arrest of Paul Moynahan, Deputy Chief of the Waterbury Police, was a part of a number of arrests by the State Police incidental to an investigation of a so-called "stolen goods ring". (R, Ex. A, pp. 70-72).

Paul Moynahan was represented first by Attorney F. Owen Eagan who handled the filing of motions and early discussions with the State's Attorney, Francis McDonald.

Attorney Eagan filed an extensive motion for discovery seeking all exculpatory material and named a number of people, but not Edward Miller. (R, Ex. 2, pp. 10-13). The failure of the State to respond to this prompted an inquiry by Attorney Eagan (R, Ex. A, p. 34a) and a reply in letter form by Attorney McDonald (R, Ex. A, p. 35a).

This latter letter constituted the sum total of all production by the State (except for production of petitioner's own statements). (R, Ex. A, pp. 102-4).

In discussing the case with Attorney McDonald before trial, Attorney Eagan was told that the State had a "clean" witness who could put the stolen set in Moynahan's house (R, Ex. E, pp. 28-9). The State would not tell who the "clean" witness was and the identity of this person because an obvious and key area for investigation by the defense.

The pretrial investigation by the defense was intensive but the identity of the "clean" witness was never determined (R, Ex. E, p. 29).

The identity of Edward Miller was known, since he testified for the State in another trial involving an accusation of receiving sets which were stolen by John Bishop and stored by Charles Vernale, during which trial he gave contradictory testimony about the sale of a stolen set to a Mrs. MacIntosh (R, Ex. E, p. 29, Ex. A, pp. 15a, 16a). It was also known that he had admitted selling stolen sets to Messrs. Gaspari and Stevens (R, Ex. E, p. 29).

Further investigation of Miller eliminated him in the minds of the defense as the so-called "clean witness" because (1) he had a misdemeanor conviction involving stolen TV parts and a misdemeanor conviction involving an assault complaint by a girl of about 15; (R, Ex. E, p. 29) and (2) he was a partner in a television sales and repair business known as Miller & Fellin, Inc. but nonetheless had bought at least two new sets out of the back of the garage of one Charles Vernale, who had thereafter pleaded guilty to charges involving fencing stolen television sets (R, Ex. E, p. 29, Ex. 2, p. 203).

The State's prosecution of the defendant was lengthy as was the defense. The latter centered around a denial of the receipt of the set as well as a denial of its presence at any time in the Moynahan home, which assertions were presented through several witnesses, including the defendant who testified on his own behalf. (R, Ex. A, pp. 26a-31a).

However, notwithstanding the length of the State's case the evidence offered by it to place the set in Moynahan's possession was limited to (1) the testimony of the thief, John Bishop, (2) the inference which the jury was asked to draw from the invocation of the Fifth Amendment by John Bishop's cohort, Charles Vernale and (3) the testimony of Edward Miller that he repaired a set in the Moynahan home and that a smashed set found some year or two later in woods outside of Waterbury was the same set. (R, Ex. A, pp. 4a-10a, 12a-16a, 20a-21a).

At the trial John Bishop's testimony was that he had delivered a 23" Motorola Early American Maple Console stolen from Martin's Appliances in North Haven, to Paul Moynahan's home at a certain date and time, in a certain way and in the company of Charles Vernale. (R, Ex. A, pp. 4a, 5a). A motion was then made for copies of all prior statements of Bishop to the police or prosecution and his prior testimony before the one-man grand jury. The State objected but after argument the trial judge made an in camera inspection and ordered all statements produced. (R, Ex. 2, p. 143).

These statements revealed that John Bishop had given prior statements which contained different versions of the facts relating to the make, model and size of the set, the place where it was stolen and the date, time and manner of delivery (R, Ex. A, pp. 7a, 8a). These inconsistencies

were brought out on cross-examination (R, Ex. A, pp. 7a, 8a).

Bishop also revealed that he had a lengthy past criminal record (R, Ex. A, pp. 6a, 7a) and had admitted some 30 to 35 breaking and entries and the theft of numerous goods in these breaks, but had not yet been charged with any of these offenses (R, Ex. A, p. 7a). He also acknowledged that he had pleaded guilty to one charge some seven months before, but had not been sentenced (R, Ex. A, p. 9a).[2] Nonetheless he denied any promise or inducement in return for his testimony except that the sentencing judge would learn of his cooperation. (R, Ex. A, p. 8a).

During the course of its own argument to the jury the State characterized John Bishop as follows: "Now Vernale and Bishop are no prizes, . . ." (R, Ex. D, p. 29a); [A., p. 290].

The State's use of Charles Vernale at trial gave rise to one of the points covered in this appeal.

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[2] Bishop admitted at the hearing on a new trial that he received a suspended sentence on this charge and was never presented on the other charges. (R, Ex. E, p. 26)

He also revealed that prior to Moynahan's trial Bishop had attempted suicide while in Montville jail and had been transferred to Norwich State Hospital. This was during the time he was being interrogated by the State Police. Bishop testified that the history of that hospitalization confirmed that this suicide was brought on by the pressure being exerted on him by the State Police to give information against Moynahan (R, Ex. E, pp. 10, 16). The defense was never told this before or during the Moynahan trial and did not know about it then. Also at the petition for a new trial the petitioner offered the testimony of two prison inmates and the affidavit of a third that John Bishop had stated in their presence that he had made a deal to testify against Paul Moynahan and that he was going to lie. (R, Ex. E, pp. 7-8, 25-7)

Basically the Record shows that Vernale was called by the State. The defense immediately presented a lengthy argument in the jury's absence that Vernale intended to invoke the Fifth Amendment, which invocation, if done, would violate the defendant's Sixth Amendment rights. Therefore, the court was asked to make an inquiry in the jury's absence. In support of its assertion the defense had present Vernale's court-appointed public defender, Peter Carolan, Esq. The court refused to hear him. (R, Ex. D, pp. 1a, 2a).

The court further appeared to misapprehend the argument and dismissed it in the following manner:

> "The Court: But Mr. Hennessey, you don't have the right to make these claims. You, as counsel for Mr. Moynahan, have no standing to make any claims with reference to whatever rights Mr. Vernale has.
>
> . . . . .
>
> The Court: Now, it seems to me that the comment you make is a very improper one.
>
> . . . . .
>
> The Court: Mr. Hennessey, you have no right to be concerned with Mr. Vernale's rights. That is not your function as defense counsel for Mr. Moynahan. You have no standing to even make these comments to the court.
>
> . . . . .
>
> The Court: The State has the right to call anybody. The State has the right to call you. The State has the right to call me as a witness, if necessary. You have no rights here." (R, Ex., D, pp. 3a, 4a).

It did, however, finally offer to make such inquiry if the prosecutor agreed. The state still objected, relying

solely on the theory that it did not know if Vernale was going to invoke the Fifth Amendment. (R, Ex. D, pp. 5a-8a). [A. pp. 251-7].

Vernale was then allowed to take the stand and in answer to a prosecution question he invoked the Fifth Amendment. The prosecutor then asked a second question and Vernale invoked the Fifth Amendment again. (R, Ex. D, p. 8a) [A., pp. 260-1].

The prosecutor then asked the following question and obtained the following answer,

> "Q. Did you ever make a gift of a television set, a color television set to Mr. Moynahan?
>
> A. I take the Fifth Amendment on that. I don't want to incriminate myself." (R, Ex. D, p. 8a); [A., p. 261].

Thereafter during its rebuttal argument to the jury the prosecution made the following reference to Charles Vernale,

> ". . . And Charlie Vernale was asked, "Did you give the defendant, Paul Moynahan a color television set? Did you deliver it to him? And he took the Fifth Amendment. He is not a very great guy." (R, Ex. D, p. 9a); [A., p. 289].

Immediately after Vernale's last invocation of the Fifth Amendment the State ended its questioning of him. The defense then moved for copies of all prior statements or testimony of Charles Vernale. (R, Ex. D, pp. 70s-76a); [A., p. 262]. During the course of the ensuing argument the court twice ruled that all such statements should be turned over to the defense (R, Ex. D, 70a, 71a, 73a). The State, however, persisted in its objection and the court then changed its ruling, declined

to make an in camera inspection but ordered the State to review the statements in the light of Justice Fortas' language in *Giles* v. *Maryland* and to produce,

> ". . . evidence in its exclusive possession, which is not merely cumulative or embellishing and which may be of material importance to the defense, regardless of whether it relates to testimony given at trial." (R, Ex. D, pp. 72a-75a).

The state then produced certain redacted documents. (R, Ex. 23 for ID); [A., pp. 236-241]. The unproduced portions were sealed at the defendant's request by the court without inspection and were first examined by Judge Blumenfeld in this present proceeding.[3] (R, Ex. D, pp. 75a-76a, Ex. 24 for ID); [A., pp. 242-245, 326-327]. *Memorandum of Decision*, pp. 11-12, fn. 17).

The evidence of Edward Miller offered by the State related solely to his actions as a repairman in repairing a set at the Moynahan home and later identifying a set shown to him by the State Police as the same set (R, Ex. A, pp. 12a-13a).

At the commencement of cross-examination Edward Miller testified that he had given statements to the Connecticut State Police on February 17, 18 and 19,

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[3] The Supreme Court of Connecticut declined to look at the sealed documents, since their ruling was in effect that a defendant is not entitled to relief because of a denial of production unless the defendant can demonstrate that he was prejudiced by it. Since the defendant did not know what was in the statements he could not demonstrate the harm resulting from such non-disclosure and since such harm could not be shown the Court saw no reason to see what the statements contained. (R, Ex. C, pp. 28b-29b) The Judge at the hearing for a new trial was also asked to examine the statements but similarly declined. *Moynahan* v. *State*, 31 Conn. Sup. 296, 329 A. 2d 619 (1974).

1969 and before the Grand Jury. (R, Ex. A, p. 13a). The defendant moved for these statements, and the State objected. The defense further requested an in camera inspection which the court declined to do. Rather it issued an order that the State turn over any matter which would be of assistance to the defense. The prosecutors then reviewed and redacted the statements (R, Ex. D, p. 69a, Ex. 24 for ID); [A., pp. 6-12, 22-64, 88-96, 100-107, 131]. The redacted portions were sealed without inspection.[4] *Memorandum of Decision*, pp. 11-12, Fn. 17; [A., pp. 326-327].

In the jury's absence the trial judge thereafter requested a statement as to the parameters of the proposed cross-examination. The defense indicated that it appeared from the facts known at that time that Edward Miller was probably linked with Charles Vernale and therefore the defense wanted to cross-examine him to establish his criminal involvement as evidence of his bias, interest or motive to testify on the State's behalf. (R, Ex. D, pp. 10a-11a); [A., pp. 131-147]. The State objected on the ground that, since Miller had not been arrested, no such inquiry could be pursued. (R, Ex. D., pp. 12a-14a); [A., p. 142].

The Court then adjourned without ruling and in an in chambers conference heard further argument. It then ruled that if any questions were asked in the jury's presence concerning Miller's possible criminal involvement a mistrial would be declared. (R, Ex. E, pp. 29-30). The defense then requested an opportunity to examine Miller outside the jury's presence in order to establish facts for an offer of proof.

The court agreed to this procedure. However, as soon as questions touching on the purchase of sets were

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[4] See Note 3, *supra*.

asked the State objected, and the court did not permit Miller to answer. As to these rulings the defense excepted in accordance with Connecticut Practice. (R, Ex. D, pp. 18a-19a); [A., pp. 222-226]. During this inquiry the defense also asked questions concerning whether Miller was told he was under investigation, whether he was apprehensive and whether any promises, threats or inducements had been made. (R, Ex. 6, pp. 555-562); [A., pp. 215-222]. The witness was allowed to answer these questions and denied any promises or threats, denied any apprehension or fear during interrogation and stated that he had not been told nor did he believe that he was under investigation by the State Police. (R, Ex. 6, pp. 555-562); [A., pp. 215-222].

The subsequent disclosure in this proceeding of the redacted portions of the requested statements revealed that each of those answers were contradicted by the withheld evidence. (R, Ex. 24 for ID); [A., pp. 6-12, 20-64, 88-96, 100-107]. And see Brief, pp. 27-33, infra.

After the ruling by the Court barring any cross-examination relative to Miller's criminal involvement the defense tried to introduce this line of evidence collaterally through two witnesses, Stevens and Gaspari, both of whom bought stolen sets from Miller. However, upon the State's motion the jury was excused and the defense was required to question Mr. Stevens in the jury's absence (R, Ex. D, pp. 19a-27a); [A., 298-316]. The State objected to allowing the testimony to be heard by the jury on the ground that it was an attempt to bring in collaterally what the court had already ruled out on cross-examination, i.e. to cross-examine Miller as to his possible criminal involvement (R, Ex. D, p. 20a); [A., pp. 300-1]. The court then ruled that no evidence from these two witnesses could be heard by jury (R, Ex. D, pp. 23a-27a); [A., pp. 313-5]. Exceptions to

these rulings were also taken. (R, Ex. D, p. 27a); [A., pp. 314-5].

During the closing argument the state characterized the testimony of Edward Miller as follows:

Main Argument

> ". . . There is one man in this case that we can believe, if anybody, Ed Miller. This is the one man that we know is telling the truth . . .

Rebuttal Argument

> ". . . Now Vernale and Bishop are no prizes, but what about the other witness Edward Miller. The defense has tried to get at him but had a hard time trying. You should believe Ed Miller because he has no axe to grind in this case. He has no possible motive to tell an untruth . . . Why would Ed Miller do a thing like this? He was merely questioned by the State Police. He was subjected to intensive cross-examination, which must have been unpleasant. And he only got involved because he was interviewed, since there is not one shred of an indication as to his being motivated to do harm or damage to the defendant. . . ." (R, Ex. D, pp. 29a-30a), [A., pp. 276, 290-2].[5]

Subsequent to Moynahan's conviction he appealed, and thereafter petitioned for certiorari on all the issues now before this court which petition was denied. *State* v. *Moynahan*, 164 Conn. 560, 325 A. 2d 199 (1973) *cert. denied*, 414 U.S. 976 (1973). (R, Ex. C, D).

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[5] With respect to this argument Judge Blumenfeld noted, "This argument borders on the unconscionable considering the prosecution's knowledge of Miller's involvement. *See* III, *infra*." *Memorandum of Decision*, p. 7, fn. 10; (A., p. 322).

ARGUMENTS

A. The district court properly concluded that the petitioner, Paul Moynahan, had been deprived of his 6th/14th Amendment right of confrontation by virtue of the trial court's refusal to permit cross-examination and other evidence designed to establish that a key state's witness, Edward Miller, was involved in the "stolen goods ring", to which the prosecution referred in order to establish his bias, interest or motive to testify in a manner favorable to the State's case.

1. The facts demonstrate that (1) there was such a denial and (2) there was no abandonment by the petitioner of his right to claim such denial.

The Claim of the petitioner that he was denied his right to establish the bias, interest or motive of Edward Miller was never considered by the Connecticut Supreme Court although it was extensively briefed. The reason given by that court was that the petitioner had abandoned that claim at trial. *State* v. *Moynahan, supra.* (R, Ex. C, p. 24b).

The petitioner filed a motion to reconsider that ruling but the supreme court rejected this request. (R, Ex. B). The district court, however, ruled that the Record indicated that no such abandonment occurred. *Memorandum of Decision*, pp. 8-10; [A., pp. 323-5]. The petitioner submits that this conclusion was proper. The Record reveals that the petitioner presented to the Court at its request the argument that he was entitled to cross-examine Edward Miller concerning his involvement with Charles

Vernale in the receipt and resale of stolen television sets. Moynahan argued that his understanding was that Miller had sold at least two stolen sets and that that fact coupled with the fact that he was also a television dealer but was apparently dealing in a manner inconsistent with reputable practices compelled the conclusion that he was criminally involved. Therefore it was proper for the defense to probe this area since a witness's criminal involvement in the matters in issue would bear strongly upon his interest in testifying or motive to testify for the state. (R, Ex. D, pp. 10a-11a, 16a-17a). The State argued that since Miller was not arrested he could not be questioned about criminal activity. (R, Ex. 2, p. 205). The court did not rule on these conflicting claims but rather called a recess. (R, Ex. 2, p. 33); [A., pp. 435].[6]

Thereafter the court indicated that it would allow matters to be inquired into in the jury's absence. The ensuing line of inquiry took two paths.

One line was the inquiry into the circumstances surrounding Miller's involvement with stolen televisions. (R, Ex. D, pp. 18a-19a); [A., pp. 222-6]. The Court, however, would not permit Miller to answer any of the questions touching on this area, and it thus appeared to counsel that the court was not going to allow such questions even in the jury's absence. Consequently the defendant, in accordance with Connecticut practice, objected and excepted to the rulings.

The second line of inquiry related to possible promises, threats or inducements stemming from any investigation

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[6] Evidence was proffered regarding this in chambers conference in order to show that the trial judge ruled that any pursuit of the proposed line of cross-examination would result in mistrial. (R, Ex. E, pp. 29-30).

focusing on Miller himself. As to this line the court allowed Miller to answer and all his answers were "no" [7] The court then indicted that it was going to have the questions to which answers were allowed read to the jury. The defendant obviously opposed this, and therefore indicated that he would not press those questions. (R, Ex. 6, pp. 555-562); [A., 215-222]. Consequently the most that was ever abandoned was the presentation, in a particularly prejudicial form, of testimony, which was actually false and probably perjurious.

That no abandonment occurred as a result of this incident is even more obvious when it is realized that the defense tried to bring the issue up again collaterally through testimony from purchasers of stolen sets. However, once again the State objected and the manner in which that objection was framed makes it clear that the trial judge had in fact made an earlier ruling that this line of inquiry could not be pursued.

> "Mr. Secor: And we consider that highly improper, irrelevant, and immaterial in this case, and you and we know, your Honor, what the objective here is. They weren't able to attempt to attack Miller directly on the stand because of the law, and now this is a circuitous route to try to get about the same way, and there is case law that even though Miller, even though he could have been cross-examined about this very matter when he was on the stand, there is case law that independent proof through other witnesses concerning that matter cannot be offered.
>
> Now, in the Miller case, he wasn't even able to be cross-examined about it under the law, and cer-

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[7] The withheld evidence revealed that these answers were in fact false. See Brief, pp. 27-9, *infra*.

> tainly they cannot drag in via the back door outside witnesses about the purchase and sale of sets that have nothing to do with this case." (R, Ex. D, p. 20a); [A., pp. 300-1].[8]

The trial court agree dwith the State's argument and refused to allow either Stevens or Gaspari to testify before the jury. The defense duly excepted to this ruling as well. (R, Ex. D, p. 27a); [A., pp. 313-5].

The evidence later developed in the hearing on the petition for new trial as well as the evidence revealed in the previously withheld evidence makes it apparent that the proposed examination would have had material implications, since it showed that Edward Miller was indeed involved in criminal activity with Charles Vernale.

Thus at the new trial hearing John Bishop testified that he saw Miller at Vernale's house on several occasions and knew him to be Vernale's "outlet" for stolen sets. (R, Ex. E, p. 9). At the same hearing Charles Vernale testified that Edward Miller bought several stolen sets from Vernale, which he, Miller, knew were stolen. (R, Ex. E, p. 9). When Miller was called at the new trial hearing he invoked the Fifth Amendment to questions concerning his dealings with Vernale and also invoked the Fifth Amendment to questions aimed at eliciting the fact that he had perjured himself at the Moynahan trial. (R, Ex. E, pp. 38-9).

The withheld evidence also revealed statements of Miller which would clearly constitute admissions that he knew Vernale was selling stolen goods, when he dealt with

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[8] Consequently, for the State to now argue that the line was abandoned is a contradiction of its position at trial.

him, that he was buying new sets from Vernale for as little as 1/3 of their resale price, notwithstanding his knowledge of legitimate prices (which were much higher) and that he serviced a number of sets at Vernale's request which Vernale had sold to various people in Waterbury. (Brief, pp. 29-32, *infra*).

The petitioner therefore submits that as to the evidence sought to be developed,

1. It was the type which the defense is entitled to introduce as a matter of right by virtue of his 6th/14th Amendment right as specified in the confrontation clause of the 6th Amendment.

2. That while proof of prejudice does not appear to be necessary in the case of a constitutional violation of this type, nonetheless, there is ample evidence to prove it;

3. That no abandonment of this right of inquiry occurred.

Therefore the district court did not err in concluding that there had been a deprivation of the petitioner's constitutional right of confrontation.

2. Rebuttal to Certain of the State's Arguments:

1. The Argument at pages 8 to 14 of the State's brief sets forth the contention that the defense was allowed a full opporunity to cross-examine Edward Miller. In actuality, however, its claim when placed in context supports the petitioner's version of the facts.

The portions of the transcript referred to by the State reveal that after the lengthy arguments over the limits of cross-examination (R, Ex. D, pp. 10a-18a); [A., pp. 132-

147], at which point the petitioner claims that the in chambers exclusionary ruling was made, (R, Ex. E, pp. 29-30), but before the hearing wherein efforts were made to cross-examine Miller in the jury's absence, (R, Ex. 2, pp. 555-562); [A., pp. 215-222] the defense asked questions of Miller concerning his handling of other sets obtained from Vernale. The State objected but the trial judge allowed some of the questions upon the defense's claim that they bore upon the possibility of a mistake by Miller in his identification. See Appellant's Brief, pp. 8-14; [A., pp. 156-175].

These references it is submitted tend to confirm the in chambers ruling since it was necessary to resort to a less relevant ground in order to get this evidence in for the very reason that the court had ruled that inquiry on the more relevant fact of Miller's own criminal involvement would not be allowed.

The defense in fact was forced to use the identification argument in order to introduce the evidence it did know, i.e. the sales to Stevens and Gaspari and repairs of sets sold by Vernale. However, it had been blocked by the prior ruling from trying to develop that which it claimed was relevant, i.e. the full scope of Miller's involvement as a conscious party to the sale of stolen sets.

That this was what was in fact occurring is further fortified by a review of the proceedings when the testimony of Stevens and Gaspari was offered, since the defense at that point also tried to establish relevance through claims that the testimony went to (1) identification and (2) contradiction of specific prior testimony, e.g. Miller's claim that he sold sets through Miller & Fellin, Inc. and Bishop's claim that the set given to Moynahan was the biggest set he ever stole. (R, Ex. D, pp. 19a-27a); [A., pp. 299- 312].

The State, however, objected for the very reason that the defense was really trying to offer collateral evidence to establish that which the court ruled it could not offer on cross-examination i.e. evidence of Miller's criminal involvement. (R. Ex. D, p. 20a); [A., pp. 300-1].

2. The reference at p. 14 to the occurrence in the jury's absence is incomplete in a significant respect. For while the state refers to what defense counsel said with respect to not pursuing the line of inquiry which Miller was permitted to answer[9] it neglects to note that as to the questions which Miller was not allowed to answer the following occurred:

> "Mr. Hennessey: But I would only ask that you permit me to have those portions of those questions which we have asked here be presented to the Court as an offer of proof.
>
> The Court: Any objection to that?
>
> Mr. Gaffney: No objection.
>
> The Court: Very well. It is so ordered.
>
> Mr. Hennessey: And so that the record would be clear, I then take exception to your denial of permitting me to introduce those few questions.
>
> The Court: Exception may be noted."

(R, Ex. D, pp. 18a-19a); [A., pp. 224-226].

3. The statement at page 14 that at no time were other questions asked as to bias or prejudice against the appellee or whether any improper design or motive existed for his testimony is also misleading, since the testimony at the new trial proceeding from Attorney Secor, the

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[9] The disclosures in this proceeding revealed, of course, that those answers were false and probably perjurious as well. See Brief, pp. 29-32, *infra*.

Chief Prosecutor at trial, was that the defense tried throughout the trial to be permitted to show Miller's criminal involvement, and that its right to do so was one of the most vigorously contested issues in the case. (R, Ex. E, p. 30).

Therefore the implication should not be that the defense did not try to pursue this line, since the reality is simply that it was not allowed to do so.

4. At page 18 the State argues that the defense was allowed to cross-examine Miller about repairs to sets sold by Vernale, but neglects to note that it withheld statements revealing that Miller had done many more repairs than he admitted on cross-examination. See Brief pp. 29-31, *infra*.

5. Also at pages 17 and 18 the State argues that the defense was never precluded from asking Miller those questions which he had answered in the "dry-run" but again neglects to mention that it withheld evidence which showed that these answers in fact were false. See Brief, pp. 27-29, *infra*.

6. Still further the State at page 18 singles out two areas of specific inquiry, i.e.

> a. a "repetitious" question to Miller in which he was asked again whether he believed he was under investigation when he had said he was not; and
>
> b. a "far afield" line of inquiry about what he paid Vernale for the sets he bought and whether he got invoices.

However, it fails to note as to a. that the answer was in direct conflict with withheld testimony, See Brief, p.

27-29, *infra*. And it fails to mention as to b. (1) that legitimate business dealings had been testified to, which evidenced (a) the use of invoices and (b) the identity of legitimate Motorola dealers (R, Ex. A, pp. 4a, 11a) and (2) that withheld statements showed that he bought from and paid Vernale in amounts for sets which resulted in mark-ups of anywhere from 62% to 100% on resale even though he knew that normal mark up resulted in 25% to evidenced (a) the use of invoices and (b) the identity of 30%. See A., pp. 12, 36-7, 44, 62-3. Therefore, the "far afield" characterization is also misleading.

6. At page 20 the State implies that Miller's testimony was clear and "manifestly reliable" but neglects to mention that his "clear" and "reliable" in-court testimony about his repair to the Moynahan set had been preceded by a number of statements to the police in which no such description was given and in which he stated that he couldn't identify the set by the repair, and indeed couldn't identify it in any other way either. (R, Ex. A, pp. 14a-16a).

7. At page 25 the State argues with respect to the proposed Stevens' testimony that "by counsel's own admission the defense was unable to prove through this witness that Miller knew the Motorola set was stolen". This argument again neglects to consider the significance of the prosecution's actions in withholding statements of Miller which showed that he did know this. See Brief, p. 31, *infra*.

3. Petitioner's Claims of Law:

The issue of the abridgement of the petitioner's 6th/14th Amendment right of confrontation was properly found in favor of petitioner.

In this regard the Court properly concluded that it was not bound by the Connecticut Supreme Court's conclusion of abandonment, since in the context of a review of the Record, that ruling was one of law, as it merely involved a determination of whether the necessary objections and exceptions were taken as required by Connecticut law. Consequently, the District Court was free to reach its own independent conclusion. *Townsend* v. *Sain*, 372 U.S. 293 (1962).

Still further it is recognized that the waiver of a constitutional right to cross-examine is a federally reviewable matter. *Brookhart* v. *Janis*, 384 U.S. 1, 3-4 (1966).

In addition, insofar as the trial court's evidential ruling abridged a constitutional right they might be reviewed even if no objections were taken. *Gann* v. *Smith*, 318 F. Supp. 409, 412 (N.D. Miss. E.D. 1970) app. dis. 443 F.2d 352 (5th Cir. 1971).

Thus, for several reasons, the court correctly concluded that a review of the threshold issue of abandonment was open to it. *Henry* v. *Mississippi*, 379 U.S. 443, 452-3 (1965).

Insofar as the merits are concerned it appears clear that the right to cross-examine with respect to a prosecution witness' bias, interest or motive is an integral part of the Sixth Amendment Right of Confrontation. *Davis* v. *Alaska*, 415 U.S. 308 (1974); *United States* v. *Harris*, 501 F.2d 1, 9 (9th Cir. 1974).

While the State argues that retroactivity bars the subsequent applications of *Davis* v. *Alaska*, *supra*, it seems clear that the right recognized was not newly found since the application of the confrontation clause to cross-

examination was already established by *Brookhart* v. *Janis*, *supra* at p. 4; *Pointer* v. *Texas*, 380 U.S. 400, 406 (1965). Consequently *Davis* v. *Alaska*, *supra* merely represents an application of a settled rule to a particular set of facts rather than the expression of a new rule of law. *Chesney* v. *Robinson*, 403 F. Supp. 306, 311, fn. 10 (D. Conn. 1975) (also by Judge Blumenfeld).

Recent applications of *Davis* v. *Alaska*, *supra*, confirm its applicability to this case. Thus in *United States* v. *Croucher*, 532 F.2d 1042, 1045 (5th Cir. 1976) error was found in the fact that the trial judge barred the defense from inquiring about a witness' pending arrest in order to show his "vulnerability to pressure by the prosecution at the time he gave his testimony". See also *United States* v. *Miranda*, 510 F.2d 385 (9th Cir. 1975).

The reliance on this Circuit's decision in *United States* v. *Finkelstein*, 526 F.2d 517, 529 (2d Cir. 1975) does not seem well taken. It was recognized in that case that there was no evidence that the line of inquiry was real, since the court indicated that there was no *Brady* material produced and no claim that the prosecution failed to discharge its duty. *Ibid.* Therefore the case merely holds that it was not constitutional error to deny a right to ask questions about a promise of immunity when it appears that there was in fact no such promise. The case under consideration is thus readily distinguishable since there was a substantial valid basis for cross-examination of Edward Miller. Therefore the denial of the right must be deemed to be reversible error. And this would be so even if there were no proof of prejudice. *Davis* v. *Alaska*, at p. 318; *Brookhart* v. *Janis*, *supra* at p. 3. Of course in this case there would be prejudice in view of the importance of Miller and the later argument relative to his testimony. *United States* v. *Gerard*, 491 F.2d 1300, 1304 (9th Cir. 1974); *Terry* v. *Commonwealth*, 471 S.W.

2d 730, 732 (Ky. 1971); *People* v. *Mack*, 120 Ill. App. 2d 149, 256 N.E. 2d 501 (1970).

Finally it should be noted that the same rule applies whether the denial is of the right of cross-examination to establish bias, interest or motive or of the admission of collateral evidence on this point, i.e., the Stevens and Gaspari testimony. *Johnson* v. *Brewer*, 521 F.2d 556, 561-2 (8th Cir. 1975).

Thus for this reason alone the Court was warranted in ordering a new trial.

B. The district court properly concluded that the prosecution had withheld evidence which met the test for production set forth in *United States* v. *Agurs*, U.S. , 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976).

It should be clear from the record in this case that exhaustive efforts were made by the defense to try and get evidence in the State's possession which would fit the constitutionally defined parameters of the State's duty to produce.

It filed a motion for exculpatory evidence long before trial singling out Charles Vernale and John Bishop and including specific requests for Grand Jury testimony and prior statements to the police. (R, Ex. 2, pp. 10-13). That motion was granted but it produced nothing. This prompted defense counsel to write to the State's Attorney to remind him that exculpatory evidence had been requested. (R, Ex. A. p. 34a). This resulted in a letter from the State's Attorney, which was the only production made by the State. (R, Ex. A. p. 35a).

The defense then put the matter to the court via a motion to dismiss. (R, Ex. 2, pp. 13-14). The court heard the argument and agreed with the defendant's contention that prior contradictory statements and any statements germane to the credibility of State's witnesses were included within the term "exculpatory". (R, Ex. D, pp. 49a, 51a-52a). The court, however, merely told the State to do its duty (R, Ex. 9). This order also produced nothing.

Finally at trial the State, over its vigorous objection, was ordered, following John Bishop's direct testimony, to produce all prior statements. However, after Miller and Vernale's testimony, it was only ordered to produce such statements as the prosecution on its own review deemed to meet the broad definition of exculpatory used by Justice Fortas in *Giles* v. *Maryland* (R, Ex. D, pp. 69a-76a).

These orders produced a quantity of statements which established, in the minds of the defense, at least, that the prosecution had clearly, if not flagrantly, disregarded the pretrial order. As a result the defense moved for a mistrial and outlined several ways in which the produced statements were exculpatory. The defense further argued that the manner of production and timing of production had prevented both a proper preparation before trial and a proper use of the evidence at trial. The trial judge denied that motion as well. (R. Ex. D, pp. 40a-65a).

In the case of the redacted portions of Miller's and Vernale's pretrial statements the defense had them sealed and made a part of the record, but was unable to convince any judge to look at them until Judge Blumenfeld did so.

Based upon his review Judge Blumenfeld concluded that the State allowed Miller to answer questions negatively, after it had redacted prior statements which

directly contradicted such negative answers. *Memorandum of Decision*, pp. 13-17; [A., pp. 328-332]. These answers related directly to the degree of pressure which was actually put on Edward Miller by the State Police and bore out the fact that Miller was a suspect who would have been arrested were it not for the fact that it was decided to keep him "clean". Brief, pp. 27-9, *infra*.

The portions of withheld testimony upon which Judge Blumenfeld relied were deemed by him to be sufficient to compel a new trial either alone or in conjunction with the remaining constitutional errors.

However, they were not the only portions which fit accepted definitions of exculpatory matter, since there were in fact 30 separate items which the defense can identify as being within such definitions:

1. The evidence withheld revealed 30 separate items of exculpatory matter.

(1) Edward Miller answered "No" when asked if he were told by the State Police that he was under investigation whereas in truth this had been made crystal clear to him by the police. (R, Ex. 6, pp. 555-556 [A., pp. 215-6], Ex. 24 for ID, 2/18/69, (Miller), pp. 2-4, 5-6, 18-21, 25-31, 40-1) [A., pp. 20-24, 29-32, 35-42, 49-50].

(2) He testified he was not threatened by the police when in fact he had been. (R, Ex. 6, p. 557 [A., p. 217], Ex. 24 for ID, 2/18/69 (Miller), 11-12, 16-17, 31, 40-1, 47-9; [A., pp. 25-6, 27-8, 41, 49-50, 56-8]; 2/21/69 (Miller), p. 28 [A., p. 94]).

(3) He testified there was no promise as to what would occur if he testified when in fact there had been. (R, Ex. 6, p. 557 [A., p. 217]. Ex. 24 for ID, 2/18/69 (Miller), pp. 47-9 [A., p. 56-8]).

(4) He testified there wasn't even a conversation about promises when in fact there had been. (R, Ex. 6, p. 557 [A., p. 217], Ex. 24 for ID, 2/18/69 (Miller), pp. 40-1, 47-9 [A., pp. 49-50, 56-8]).

(5) He testified that he wasn't apprehensive when being questioned by the police when in fact he had been. (R, Ex. 6, p. 559 [A., p. 219], Ex. 24 for ID, 2/18/69 (Miller), pp. 38, 40 [A., pp. 47, 49]).

(6) He testified that there wasn't even a suggestion that he was under investigation when in fact there had been repeated indications that he was. (R, Ex. 6, pp. 559-560 [A., pp. 219-220], Ex. 24 for ID, 2/18/69 (Miller), pp. 18-21, 31, 37-38, 40-1, 47-9, 52 [A., pp. 29-32, 41, 46-7, 49-50, 56-8, 61], 2/21/69 (Miller), p. 28 [A., p. 94]).

(7) He testified that he didn't at any time think he was under investigation when he knew he was. (R, Ex. 6, p. 560 [A., p. 220], Ex. 24 for ID, 2/18/69 (Miller), pp. 18-21, 37-8, 40-1, 47-9, 52 [A., pp. 29-32, 46-7, 49-50, 56-8, 61], 2/21/69 (Miller), p. 28 [A., p. 94]).

(8) He testified that nothing was ever said about what would happen to him if he did or did not cooperate whereas there was in fact such conversation. (R, Ex. 6, p. 560 [A., p. 220], Ex. 24 for ID, 2/18/69 (Miller), pp. 37-8, 40-1, 47-9 [A., pp. 46-7, 49-50, 56-8]).

(9) He testified that during the entire period of interrogation by the police there were no threats or promises when in fact there had been. (R, Ex. 6, pp. 561-2 [A., pp. 221-2], Ex. 24 for ID, 2/18/69 (Miller), pp. 2-6, 18-21, 25-31, 37-8, 40-1, 47-9, 52 [A., pp. 20-24, 29-32, 35-42, 46-7, 49-50, 56-8, 61], 2/21/69 (Miller), p. 28 [A., p. 94]).

(10) He testified that no promise, threat or remark had been made to him with respect to the Lanza, Griffin, Stevens, Gaspari or MacIntosh matters when in fact there had been. (R, Ex. 6, p. 562 [A., p. 222], Ex. 24 for ID, 2/18/69 (Miller), pp. 21-2, 25-9, 31-4, 37-8, 40-1, 47-9, 60-1 [A., pp. 32-3, 35-8, 42-5, 46-7, 49-50, 56-8, 62-3], 2/17/69 (Miller), p. 26 [A., p. 12], 4/7/69 (Miller), p. 778 [A., p. 101]).

(11) He testified that he never felt he was under investigation for any of those five matters when in fact he knew he was. *Ibid.*

(12) He testified on cross-examination that Charles Vernale was a customer of Miller & Fellin, Inc. whereas the redacted evidence shows that Miller did all his business with Vernale after hours; that none of the work was put in the records of Miller & Fellin, Inc. and that Vernale would call Miller & Fellin, Inc. but would hang up if anyone except Mr. Miller answered. (R, Ex. 6, p. 484 [A., p. 156], Ex. 24 for ID, 2/21/69 (Miller), pp. 24, 27, 29 [A., pp. 90, 93, 95]).

(13) He testified on cross-examination that he only did repairs on sets at Vernale's request on two occasions, whereas in the redacted testimony he admitted first that he had repaired sets a lot of times at Vernale's request and specifically identified 10 different persons and occasions when he did such repairs. (R, Ex. 6, pp. 492-3 [A., pp. 164-7], Ex. 24 for ID, 2/18/69 (Miller), p. 62 [A., p. 64]; 2/21/69 (Miller), pp. 18-23, 27 [A., pp. 88-93, 95]; 4/7/69 (Miller), pp. 771-3 [A., pp. 102-6]).

(14) In line with (13) the redacted statement of Captain Wayne Bishop the Connecticut State Police before the Grand Jury was that Miller had claimed he repaired 7 or 8 sets at Vernale's request. (R, Ex. 24 for ID, 4/1/69 (Vernale), p. 367 [A., p. 241]).

(15) He testified on cross-examination that he had repaired only one set on one occasion at Vernale's home, whereas in the redacted statements he admitted repairing several sets at Vernale's home. (R, Ex. 6, p. 491 [A., p. 163], Ex. 24 for ID, 2/17/69 (Miller), p. 11 [A., p. 8]).

(16) He testified on cross-examination that he had not seen Charles Vernale since 1967 while in his redacted statement of 2/17/69 he said he had been to Vernale's house three months prior to look at a television set and furniture that Vernale had for sale. (R, Ex. 6, p. 495 [A., p. 167], Ex. 24 for ID, 2/17/69 (Miller), pp. 4-5 [A., pp. 6-7]).

(17) The testimony of Edward Stevens which the court excluded on the State's objection was in contradiction to redacted portions of Miller's statements in several respects. One such respect was the statement of Stevens that Miller approached him in Steven's home and offered to sell him a brand new set, whereas Miller said that Stevens asked him to sell him a set during a fortuitous meeting on the street. (R, Ex. D, p. 23a, Ex. 24 for ID, 2/18/69 (Miller), pp. 28-9 [A., pp. 38-9]).

(18) Another such respect was Stevens' testimony that the purchase price was $549 whereas Miller had said it was $400. (R, Ex. D, p. 24a; Ex. 24 for ID, 2/17/69 (Miller), p. 26 [A., p. 12]).

(19) Another such respect was Stevens' testimony that Miller told him the set was new whereas Miller had stated the set was used, and that Stevens had been told this. (R, Ex. D, pp. 23a-24a; Ex. 24 for ID, 2/17/69 (Miller), pp. 25-6 [A., pp. 11-12], 2/18/69 (Miller), p. 5 [A., p. 23]).

(20) A significant withholding was of statements of Miller concerning the prices he paid Vernale, since Miller

admitted the prices were well below the cost that would be paid if the sets had been obtained through legitimate channels. (R, Ex. 24 for ID, 2/18/69 (Miller), pp. 26-7, 34, 60-1 [A., pp. 36-7, 44, 62-3]).

(21) Another significant withholding was of the statements of Miller indicating at various times that he knew, believed or suspected that the sets he got from Vernale were stolen either when he got them or shortly thereafter (and clearly a year or more before the police questioned him). Some of these statements clearly read as admissions of criminal knowledge and activity. (R, Ex. 24 for ID, 2/17/69 (Miller), p. 11; 2/18/69 (Miller), pp. 33-4 [A., pp. 43-4]; 2/21/69 (Miller), p. 29 [A., p. 95]; 4/7/69 (Miller), pp. 775, 790 [A., pp. 103, 107]).

(22) There were also withholdings of statements contradictory to each other. One such example would be Edward Miller's statement on 2/17/69 that he had been to Vernale's home on several occasions and that he and Vernale were friendly followed by a statement the next day that he hardly knew Vernale. (R, Ex. 24 for ID, 2/17/69 (Miller), p. 4 [A., pp. 6, 8]; 2/18/69 (Miller), p. 15 [A., p. 27]).

(23) Another such example would be his redacted statement of 2/18/69 that he saw one or two sets at a time in Vernale's garage and his redacted grand jury testimony of 4/7/69 that he never saw a television set in Vernale's garage. (R, Ex. 24 for ID, 2/18/69 (Miller), p. 33 [A., p. 43]; 4/7/69 (Miller), p. 780 [A., 104]).

(24) Another such inconsistency is found in his statement of 2/18/69 that he never repaired a set for a Mr. Zollo at Vernale's request but rather did so at Mr. Zollo's request and was paid by Mr. Zollo with his later statements before the grand jury that he did this repair

at Vernale's request and was paid by Vernale. (R, Ex. 24 for ID, 2/18/69 (Miller), pp. 9, 30, 62, 4/7/69 (Miller), pp. 773, 781 [A., pp. 102, 104]).

(25) The withheld testimony of Charles Vernale revealed several examples of statements which were in contradiction to other testimony offered by the state through John Bishop.[10] One such example was John Bishop's testimony on direct that the set came from a theft of 1 or 2 sets from Martin's Appliances in North Haven whereas Vernale's redacted statement was that it was one of 5 or 6 stolen in Southington. (R, Ex. A, p. 5a; Ex. 24 for ID, 4/4/69 (Vernale), pp. 4-5, 7).

(26) Another example was Bishop's testimony on direct that the set was 23" versus Vernale's redacted statement that it was 25". (R, Ex. A, p. 5a; Ex. 24 for ID, 4/7/69 (Vernale), p. 33).

(27) Another was Bishop's testimony on direct that he and Vernale delivered the set versus Vernale's statement that he and someone other than Bishop delivered the set. (R, Ex. A, p. 5a; Ex. 24 for ID, 2/4/69 (Vernale), p. 34).

(28) Another example was Bishop's testimony on direct that he stole the set on 4/8/67 delivered it to Vernale on the same day and to Moynahan on the day following versus Vernal's statement that he first met Bishop in late 1967 or early 1968 and delivered the set to Moynahan in the summer of 1968. (R, Ex. A, p. 5a; Ex. for ID, 2/4/69 (Vernale), pp. 6, 7, 35).

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[10] Vernale testified in the hearing on the petition for a new trial that he never gave Paul Moynahan a television set but had told the State Police that he did because of threats against his son, who had since died. (R, Ex. E, pp. 10, 31-2)

(29) Another example is Bishop's testimony that the set given Moynahan was the largest set he ever stole versus Vernale's statement that it was identical to one given to another person. (R, Ex. A, pp. 8a-9a; Ex. 24 for ID, 2/4/69 (Vernale), pp. 31-4).

(30) Another example is Bishop's testimony that when he delivered the set the only other person home was Mrs. Moynahan versus Vernale's statement that when the delivery occurred the only other person at the house was Lieutenant John Griffin of the Waterbury Police. (R, Ex. A, p. 4a; Ex. 24 for ID, 2/4/69 (Vernale), p. 34).

2. Petitioner's Claims of Law:

The district court in ruling in the petitioner's favor found that the withholding of redacted statements of Edward Miller which related to his vulnerability to prosecutorial influence provided a ground for relief although the withholding of evidence dealing with his criminal involvement did not. In doing so the court approached the case from the standpoint of the law expressed in *United States* v. *Agurs*, ... U.S. ..., 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976).

Needless to say the petitioner agrees with the favorable portion of the district court's conclusion. He would, nonetheless, assert that there was too narrow an application of *Agurs* to the facts of the case.

Agurs actually addresses three potential situations: (1) where there has been a failure to disclose evidence indicating the commission of perjury, whether requested or not; (2) where there has been a failure to produce specifically requested evidence, which although not indicative of perjury, would nonetheless fit the request and

be of assistance and (3) where there has been either a general request for all "*Brady* material" or "exculpatory information" or no request at all. *Id*, 49 L. Ed. 2d 349-352.

The conclusion of the majority seems to be that in case (1) materiality is not key since the acquiescence by the prosecution in perjury is in itself the matter which demands the remedy. Likewise in case (2) the knowing refusal of the prosecution to respond to a specific request may demand a remedy without regard for the ultimate materiality of the withheld information as measured by the potential which it might have on the outcome of the case. However, in situation (3) proof of materiality is clearly required. *Ibid.*

In this instance the petitioner sees the case as falling more closely into both (1) and (2) than into (3).

First of all it is hard to see how the prosecution could sit back and allow the answers Edward Miller gave which are referenced in (1) through (11), all of which dealt with the influence of prior police interrogation on Miller's in-court testimony, since the answers he gave in court seem palpably false when measured against those earlier statements.

In like vein it seems hard to understand how the answers referred to in (12) through (16) *supra* do not also raise serious questions of perjury.[11]

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[11] When asked at the hearing for a new trial whether he had committed perjury when he testified at the Moynahan Trial, Edward Miller invoked the Fifth Amendment. (R, Ex. E, pp. 21-2, 38-9).

In any event the petitioner would suggest that the requests relative to Miller if not governed by case (1) would nonetheless fit case (2).

The pretrial request was general in requesting all exculpatory material but specific in requesting material relative to John Bishop and Charles Vernale. While Edward Miller was not included the petitioner would suggest that it does not inevitably follow that his prior statements fall into case (3).

First of all it appears that Edward Miller had been groomed to be the star of the trial. He was the "clean" witness. Consequently the State kept him under wraps. However, this does not mean that it was unaware of him or did not have him clearly in mind when the request for exculpatory material was made. Indeed it seems obvious that situations will exist where the prosecution will have a key witness whom they wish to hide in which case they will ignore any revelation which might expose that witness. Therefore it begs the issue to conclude that the knowing refusal to produce exculpatory matter concerning such a witness will be measured by the specificity of the defendant's request.

Alternatively it should be recognized that after Edward Miller's direct testimony there was a specific request and a *Giles* v. *Maryland* order of production. Therefore the withheld statements of Miller were in fact withheld after a specific order of production. Consequently if the facts before trial did not bring the case into a (2) category the facts at trial did.

The significance of withholding in the (2) case situation was stressed by Justice Stevens in *Agurs*,

> "When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *Id*, 49 L. Ed. 2d at 351.

The argument to the district court in this case also covered a broader spectrum of concerns than were ultimately found necessary to be considered, since petitioner also stressed what he had argued both before the original trial and particularly during the motion for mistrial (R, Ex. D, pp. 48a-65a). That argument was that there in fact had never been a proper and timely response to the pretrial motion because (1) all the exculpatory evidence relating to John Bishop was withheld until after the trial began notwithstanding the pretrial order to produce it; (2) the same was true as regarded Miller and Vernale, except that some was withheld during the trial as well and (3) as a result the defense never had proper production in a fashion appropriate to permit meaningful use of it. Particular reliance for this argument was on *United States* v. *Anderson*, 481 F.2d 685, 690 fn. 2 (4 Cir. 1973), *aff'd* 417 211 (1974); *United States* v. *Donatelli*, 484 F.2d 505, 508 (1st Cir. 1973); *United States* v. *Polisi*, 416 F.2d 573, 577 (2d Cir. 1969); *United States* v. *Cobb*, 271 F. Supp. 159, 163 (S.D.N.Y. 1967), *aff'd* 396 F.2d 158 (2d Cir. 1968); *Hamric* v. *Bailey*, 386 F.2d 390, 393 (4th Cir. 1967).

Consequently the petitioner believes that the issue of conscious prosecutorial withholding of exculpatory material has broader constitutional implications in this case than the district court found necessary to ascribe to it.

In any event the district court was correct in its conclusion even if the issue is limited to the evidence referred to by it and even if it is considered to be a case (3) situation. This conclusion is fortified by the recent holding of the Fourth Circuit in *Boone* v. *Paderick*, 541 F.2d 447 (4th Cir. 1976). In that case the court held that the failure of the prosecution to reveal the existence of

prior statements bearing upon a key witness' motive to testify for the state was a ground for relief under *United States* v. *Agurs*, *supra*, particularly where the arguments of the prosecution may have led the jury to believe that the witness was testifying without such motivation.

The *Boone* decision bears many similarities to the present one since defense counsel in that case likewise suspected prior influence but could not prove it, *Id* at 449, and since the prosecution likewise sat quietly by while the witness denied any promises or threats and then used such supposed absence as a basis for arguing to the jury. The case is also significant since the court found that while there might be a distinction sufficient to remove the in-court answers from the classification of clear perjury, they were nonetheless on the "edge of perjury". *Id* at p. 450. In this case it would seem that the statements are well inside of those "edges" and the case is therefore stronger than the situation presented in *Boone*.

Finally the defendant submits that the nature of the withheld evidence and the importance of Miller as a witness makes it apparent that the "materiality" required in a (3) situation has been met. In this regard the petitioner believes that *Agurs* sought mainly to clarify the standards governing the duty of disclosure and not to change the prior law with respect to it. Thus earlier cases involving similar withholding of evidence bearing on the credibility of an important prosecution witness would also support the conclusion here. Indeed such cases generally involved fact situations much less compelling than is presented in this instance. Thus their precedential value is great. *Giglio* v. *United States*, 405 U.S. 150 (1972); *Napue* v. *Illinois*, 360 U.S. 264 (1959); *United*

States v. *Seijo*, 514 F.2d 1357 (2d Cir. 1975); *United States* v. *Pacelli*, 491 F.2d 1108 (2d Cir. 1974); *United States* v. *Fried*, 486 F.2d 201 (2d Cir. 1973); *United States* v. *Kaplan*, 470 F.2d 100 (2d Cir. 1972).

C. The district court properly concluded that there had been a denial of the petitioner's 6th/14th Amendment right of confrontation by virtue of the prosecution's action in eliciting invocations of the 5th Amendment by a State's witness testifying on direct examination.

The factual background of the Vernale invocation seems fairly clear. The defense informed the court and prosecution before Vernale was put on the stand that it understood that he would invoke the Fifth and brought in Vernale's public defender to confirm the fact. In so doing the defense also set forth its Sixth Amendment argument in detail. The court said that it would examine Vernale in the jury's absence, but only if the State consented. The State refused (R, Ex. D, pp. 1a-9a). The court, however, did not acknowledge that the defense had any right even to make such a claim and implied that pressing such an argument bordered on contempt. (R, Ex. D, pp. 3a-4a).

The court and State having thus been so apprised proceeded forward in the jury's presence and obtained one invocation of the Fifth, followed by yet another such invocation. At this point with actual knowledge that Vernale was asserting his Fifth Amendment right the prosecution then elicited his invocation to a question asking whether he ever gave a television set to Paul Moynahan. The court immediately excused the jury, and after a recess the State had no further questions. It did, however, choose to capitalize on the invocation in its closing argument. (R, Ex. D, p. 9a).

1. Petitioner's Claims of Law:

The situation involving the invocation of the Fifth Amendment by Charles Vernale offers a strong if not compelling example of constitutional error.

The trial court in this case refused to consider the issue mainly because it did not comprehend the legal basis of the claim. (R, Ex. D, pp. 3a-4a). The prosecution, however, did. Nonetheless it refused to agree to a preliminary examination notwithstanding the representations by the defense and the offer of the trial judge. What makes that position difficult to sustain on any rational basis is the subsequent conduct of the State in asking a substantially damaging question after two prior invocations of the privilege. Finally the actions of the prosecution lose any possible remaining vestige of fair procedure when the use of the invocation in argument is reviewed. (R, Ex. D, p. 9a).

The action of the prosecution in obtaining an invocation of the Fifth Amendment in front of the jury has been held to be a violation of the Confrontation Clause. *Douglas* v. *Alabama*, 380 U.S. 415 (1965).

The State, however, argues that its actions in this case do not compel reversal since there was no prosecutorial misconduct because it did not know that Vernale would plead the Fifth.

This argument is difficult to accept when it is recognized that (1) the defense brought it to the prosecution's attention; (2) Vernale's lawyer was in court prepared to state that he had so advised his client and expected he would invoke the Fifth; (3) the trial judge offered to inquire of Vernale whether he was going to invoke the privilege if the State agreed, but it would not; (4) the

State asked Vernale a question and he invoked the Fifth; and (5) the State asked another question and Vernale invoked the Fifth.

Similarly the State now argues that its conduct cannot be harshly judged, since it only obtained three invocations of the Fifth. However, it fails to emphasize that the third question incorporated in leading form the essential fact for which the witness was used. Therefore three questions were sufficient for it to do all the damage that the original objection envisioned.

Finally the prosecution referred to the invocation specifically in its closing argument.

The petitioner thus submits that the record establishes a clear instance of an intentionally induced invocation, which practice was condemned in *Namet* v. *United States*, 373 U.S. 179 (1963); *Douglas* v. *Alabama*, *supra*; *Frazier* v. *Cupp*, 394 U.S. 731 (1969).

However, if the intention of the prosecution is not apparent nonetheless the resulting harm should be.

The case against the petitioner was not a strong one. John Bishop was demeaned even by his own proponent, the State. (R, Ex. D, p. 29a). Edward Miller's weight was enhanced by his insulation from cross-examination. Therefore, Vernale's invocation was a critical factor. And the State exploited it through its closing argument, which fact alone should establish the requisite prejudice. *Cain* v. *Cupp*, 442 F.2d 356, 358 (9th Cir. 1971); *United States* v. *Gerard*, *supra* at p. 1304.

What the State then was really offering was the thief, who had made a deal, the middleman, who invoked the Fifth and the seller, who was concerned over his own possible arrest. Had the case proceeded in accordance

with proper constitutional safeguards the jury would have heard more from the seller and less from the middleman. As it was the reverse was true, and it was error in both instances.

The other point which was considered by the District Court was the impact of the attempted curative charge. The position of the defense is that such a charge cannot obviate a clear error, of the type with which we are now involved. *Fletcher* v. *United States*, 332 F.2d 724 (D.C. Cir. 1964); *San Fratello* v. *United States*, 340 F.2d 560 (5th Cir. 1965); *United States* v. *King*, 461 F.2d 53 (8th Cir. 1972). Judge Learned Hand agreed but felt bound by *Delli Paoli* v. *United States*, 352 U.S. 232 (1957) to rule in a contrary fashion. *United States* v. *Maloney*, 262 F.2d 535, 538 (2d Cir. 1959). However, *Delli Paoli* was subsequently overruled by *Bruton* v. *United States*, 391 U.S. 123 (1968).

The previously cited cases express the rule that either (1) when there has been conduct of the prosecution which induced an invocation of the privilege or (2) where there has been an invocation by an important witness to a question which would permit an inference as to a critical fact in issue then the force of either such occurrence cannot be dissipated by a charge to the jury admonishing them to erase from their minds the occurrence itself and any inferences which they might draw from it.

A close analysis of *Frazier* v. *Cupp*, *supra*, does not suggest a contrary result. The Court there was at most concluding that in its totality the asserted error did not present a basis for reversal. In so doing it considered the curative charge in relation to the inquiry itself, the circumstances surrounding it and the overall evidence in order to assess the potential impact upon the jury. *Id* at pp. 735-6. Therefore it was not inconsistent with *Cain*

v. *Cupp, supra*, or the rationale of Judge Hand in *United States* v. *Maloney, supra*, which decisions expressed the reality that once a clear error is committed a charge will not cure it.

Frazier v. *Cupp, supra*, can thus be viewed as merely enunciating a rule that each situation must be subjectively evaluated to determine whether there has been an error of constitutional proportion and not as a case which recognizes a charge as a cure-all for an error of the kind falling within either (1) or (2) *supra*. This also seems to be the clear implication of later cases which applied a similar subjective test. *United States* v. *Fleming*, 504 F.2d 1045, 1049 (7th Cir. 1974); *United States* v. *West*, 486 F.2d 468, 472 (6th Cir. 1973); *United States* v. *Clark*, 398 F. Supp. 341, 368-9 (E.D. Pa. 1975). Such an interpretation thus harmonizes any claim of inconsistency between *Cain* v. *Cupp, supra* and *Frazier* v. *Cupp, supra*.[12]

The petitioner submits that this case presents the worst of both those situations described in (1) and (2), *supra*. Therefore an error of constitutional dimension necessarily flowed from these facts and should, standing alone, compel an order for a new trial.

Respectfully submitted,

PETITIONER-APPELLEE,
Paul Moynahan

By: Edward F. Hennessey
James A. Wade

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[12] It is worthwhile to note that *Cain* v. *Cupp, supra*, reflects the Ninth Circuit's own interpretation of the Supreme Court's affirmance in *Frazier* v. *Cupp, supra*, of an earlier Ninth Circuit decision. *Gladden* v. *Frazier*, 388 F.2d 777 (9th Cir. 1968), *aff'd sub nom. Frazier* v. *Cupp*, 394 U.S. 731 (1969).

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 76-2122

PAUL MOYNAHAN,
PETITIONER-APPELLEE

v.

JOHN MANSON,
RESPONDENT-APPELLANT

AFFIDAVIT OF SERVICE BY MAIL

Patricia D. O'Hara, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 51 West 70th Street, New York, New York 10023

That on the 1st day of April, 1977, deponent served the within Brief upon John F. Mulcahy, Jr., Deputy Chief State's Attorney, Drawer H, Amity Station, New Haven, Connecticut 06525

Attorney(s) for the Defendant-Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Patricia D. O'Hara

Sworn to before me,

This 1st day of April, 1977

Edward A. Quimby

EDWARD A. QUIMBY
Notary Public, State of New York
No. 24-3183500
Qualified in Kings County
Commission Expires March 30, 1979